Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:SD:TL-N-1953-01
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to: LMSB Division, Communications, San Diego
Attn: Marge Lopez, Team Coordinator, CTM 1285

from: Associate Area Counsel, LMSB Practice Group, San Diego

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subject: [redacted] - **ITC Transition Rules Claim for Refund**

This memorandum responds to your request for assistance regarding whether the period of limitations for filing a claim for refund has expired with respect to the years [redacted], [redacted], and [redacted]. This memorandum should not be cited as precedent.

ISSUE

Whether the period of limitations for filing a claim for refund has expired with respect to [redacted], [redacted], and [redacted].

CONCLUSION

Yes.

FACTS

[redacted] (the "Taxpayer") is a [redacted] company that files a federal income tax return on a calendar year basis using an accrual method of accounting.

The Service examined the Taxpayer's income tax returns for the years [redacted] through [redacted]. During this examination, the Service obtained consents extending the period of limitations for assessing tax to [redacted].

On [redacted], the Taxpayer filed amended returns for the years from [redacted] through [redacted] on the ground that it had "failed to claim all qualifying investment credit under applicable transition rules." The Taxpayer claimed additional qualifying property and additional investment credit as follows:

Year	Additional Property	Additional Credit
[redacted]	$ [redacted]	$ [redacted]

[redacted] [redacted] [redacted]

This claim is referred to hereafter as "[redacted] Claim."

Shortly thereafter, the Service presented the Taxpayer with an information document request seeking a more detailed basis for the Taxpayer's claim. The Service received the following responses:

1Q Please specify if the claim is being made based on the premise that the subject property qualifies under the binding written supply or service contract rule of § 204(a)(3) of TRA 1986?

1A Yes

. . .

5Q If your claim is being made based on a type of contract and/or applicable transition rule not noted in this request, please specify the type of contract and/or applicable rule.

5A Not applicable

The only transition rule noted in the request is the binding written supply or service contract rule under section 204(a)(3) of the Tax Reform Act of 1986 ("TRA 1986").

After reviewing the Taxpayer's [redacted] contracts, the Service advised the Taxpayer that it will disallow the claim. The Service has not yet issued a notice of disallowance.

On [redacted], the Taxpayer filed additional claims for refund for [redacted], [redacted], and [redacted] in which it asserts its entitlement to additional investment credit based on the self-constructed asset transition rule under section 203(b)(1)(B) of TRA 1986. The Taxpayer claimed additional qualifying property and additional investment credit as follows:

Year	Additional Property	Additional Credit
[redacted]	$[redacted]	$[redacted]

This claim is referred to hereafter as "[redacted] Claim." The Service believes that these claims were filed after the period of limitations expired.

DISCUSSION

Generally, a taxpayer has three years from the time his return was filed or two years from the time the tax was paid to file a claim for refund of any overpayment of tax. I.R.C. § 6511(a). If the taxpayer has consented to extend the period for assessing tax under I.R.C. § 6501(c)(4), however, he has until 6 months after the expiration of the extended period for assessing tax to file a claim. I.R.C. § 6511(c)(1).

In this case, the Taxpayer and the Service agreed to extend the period of limitations for assessing tax with respect to [redacted], and [redacted] until [redacted]. Therefore, the Taxpayer had until [redacted] to file a claim for refund.

The Taxpayer filed the [redacted] Claim on [redacted], and therefore filed it within the period of limitations. The Taxpayer filed the [redacted] Claim on [redacted], almost one year after the period of limitations expired, and therefore did not file it within the period of limitations. Consequently, the Service could disallow the [redacted] Claim on the ground that it is untimely.

The Taxpayer, however, may argue that the [redacted] Claim was an amendment to the timely filed [redacted] Claim and as such the [redacted] and [redacted] Claim constitute one single timely filed claim. Generally, the Taxpayer can prevail on this argument if it can show that the [redacted] Claim was a general claim, that the [redacted] Claim was not rejected at the time the Taxpayer filed the [redacted] Claim, and that the amendment merely makes clear specific matters the Service has already considered by investigating the [redacted] Claim. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 71 (1933); United States v. Andrews, 302 U.S. 517, 524 (1938). In this case, however, the Taxpayer cannot meet this burden, because the [redacted] Claim cannot be treated as an amendment of the [redacted] Claim and, even if it were treated as such, it does not make clear specific matters already considered by the Service.[1]

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[1] The Service is not treated as having taken final action with respect to the [redacted] Claim. Generally, a final action by the Service involves the issuance of a notice of disallowance. In this case, the Service has not yet issued this notice.

A claim for refund must set forth in detail each ground upon which the claim is based and facts sufficient to apprise the Service of the nature of the claim. Treas. Reg. § 301.6402-2(b)(1). At a minimum, the claim must "set forth facts sufficient to enable the Commissioner of the Internal Revenue to make an intelligent administrative review of the claim." Silberman v. United States, 40 Fed. Cl. 895 (1998) (quoting Scovil Manufacturing Co. v. Fitzpatrick, 215 F.2d 567, 569 (2nd Cir. 1954)).

In this case, the Taxpayer's [redacted] Claim does not meet this minimum standard. The Taxpayer stated as a basis for its claim that it "failed to claim all qualifying investment credit under applicable transition rules." It did not state with specificity which transition rules applied or provide any factual support for its claim. Consequently, the Service could have rejected the claim as not satisfying the requirements of Treasury Regulation § 301.6402-2(b).

Prior to the Service's rejection, however, the Taxpayer provided a written statement in the form of answers to specific questions posed by the Service that identified the factual and legal grounds for the refund. The [redacted] Claim, when considered in conjunction with this statement, gave the Service adequate notice of the basis for the Taxpayer's claim. See Crocker v. United States, 563 F.Supp. 496, 500 (S.D.N.Y. 1983). Accordingly, the [redacted] Claim and the written statement are considered one single and indivisible claim. See United States v. Memphis Cotton Oil Co., 288 U.S. at 71.

As noted above, the Taxpayer based the [redacted] Claim on "all applicable transition rules." The written statement narrowed the scope of the claim, stating that the only applicable transition rule was the binding written supply or service contract rule of section 204(a)(3) of TRA 1986. And it specifically abandoned any arguments that could be made with respect to other transition rules, including the self-constructed asset rule of section 203(b)(1)(B) of TRA 1986.

In its [redacted] Claim, the Taxpayer now seeks to revive the already abandoned argument. It contends that the [redacted] Claim is an amendment to the [redacted] Claim and therefore need not be filed prior to the expiration of the period of limitations. The [redacted] Claim, however, is not an amendment of the [redacted] Claim. Because the Taxpayer stated that it was not pursuing any other transition rule under TRA 1986, the [redacted] Claim should be deemed to be distinct from the [redacted] Claim. United States v. Henry Prentiss & Co., Inc., 288 U.S. 73, 88 (1933). And a retraction of an explicit abandonment, "if ever possible, must be held to be too

late when the statute of limitations has interposed a bar." Id. Therefore, the [redacted] Claim is not amendment to the [redacted] Claim, is not timely, and should be rejected on these grounds.

Even if the [redacted] Claim were treated as an amendment to the [redacted] Claim, the Taxpayer cannot show that it makes clear specific matters the Service has already considered by investigating the [redacted] Claim. After the Taxpayer's submission of the written statement, the Service examined only the Taxpayer's written supply or service contracts to determine whether the rule under section 204(a)(3) of TRA 1986 applied. Under this rule, a taxpayer may claim the investment credit under I.R.C. § 49 with respect to any property readily identifiable with and necessary to carry out a written supply or service contract which was binding on December 31, 1985. The self-constructed asset rule of section 203(b)(1)(B) does not deal with property necessary to carry out supply or service contracts; it deals with property constructed or reconstructed by the taxpayer. Under this rule, a taxpayer may claim the investment credit with respect to any property that it constructs or reconstructs if the lesser of $1,000,000 or 5 percent of the cost of such property has been incurred or committed by December 31, 1985, and if the construction or reconstruction has begun by such date. Clearly, the Service would have to investigate areas not previously investigated in order to evaluate the merits of the [redacted] Claim. Consequently, the [redacted] Claim does not meet the standard set forth in Memphis Cotton and cannot be treated as part of the [redacted] Claim.

If you have any questions, please call me at (619) 557-6014.

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